

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	.	Criminal No. 1:10cr485
	.	
vs.	.	Alexandria, Virginia
	.	January 22, 2015
JEFFREY ALEXANDER STERLING,	.	9:53 a.m.
	.	
Defendant.	.	<u>EXCERPT</u>
	.	
. . . . .	.	

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:	JAMES L. TRUMP, AUSA DENNIS M. FITZPATRICK, AUSA United States Attorney's Office 2100 Jamieson Avenue Alexandria, VA 22314 and ERIC G. OLSHAN, Deputy Chief Public Integrity Section of the Criminal Division United States Department of Justice 1400 New York Avenue, N.W. Suite 12100 Washington, D.C. 20005
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FOR THE DEFENDANT:	EDWARD B. MAC MAHON, JR., ESQ. Law Office of Edward B. MacMahon, Jr. 107 East Washington Street P.O. Box 25 Middleburg, VA 20118 and BARRY J. POLLACK, ESQ. MIA P. HAESSLY, ESQ. Miller & Chevalier Chartered 655 - 15th Street, N.W. Suite 900 Washington, D.C. 20005-5701
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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES: (Cont'd.)

2 CLASSIFIED INFORMATION  
3 SECURITY OFFICERS:

CHRISTINE E. GUNNING  
MAURA PETERSON

4 ALSO PRESENT:

GERARD FRANCISCO  
SA ASHLEY HUNT  
JENNIFER MULLIN, ESQ.

6  
7 OFFICIAL COURT REPORTER:

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1 P R O C E E D I N G S

2 (Defendant present, Jury out.)

3 THE CLERK: Criminal Case 10-485, United States of  
4 America v. Jeffrey Alexander Sterling. Would counsel please  
5 note their appearances for the record.

6 MR. TRUMP: Good morning, Your Honor. Jim Trump on  
7 behalf of the United States.

8 MR. OLSHAN: Good morning, Your Honor. Eric Olshan  
9 on behalf of the United States.

10 MR. FITZPATRICK: Good morning, Your Honor. Dennis  
11 Fitzpatrick on behalf of the United States.

12 THE COURT: Good morning.

13 MR. POLLACK: Good morning, Your Honor. Barry  
14 Pollack on behalf of Mr. Sterling.

15 MR. MAC MAHON: Edward MacMahon on behalf of  
16 Mr. Sterling, Your Honor.

17 MS. HAESSLY: Good morning. Mia Haessly on behalf of  
18 Mr. Sterling, Your Honor.

19 THE COURT: Good morning. All right, counsel, have a  
20 seat. We're going to hopefully do this very quickly.

21 The verdict form that was submitted by the  
22 government, we've made -- the only change we've made to it is  
23 we always want the foreperson's printed signature as well, so  
24 that's been changed. Otherwise, that's exactly as it was left  
25 with us. There's been no objection, so that's the one we're

1 going to send to the jury.

2 In terms of the final charge, just so you know, we  
3 did make two small typographical corrections since last night.  
4 The instruction for Count 10, where it gives the elements, we  
5 struck out the word "four" to "three," because there are only  
6 three elements; and in the witness protection instruction,  
7 there was a typo. I think "on" was "no." Whatever it was, it  
8 was a one-letter typo, but it makes no change.

9 I looked at the government's request to change the  
10 possession instruction. I'm not going to add the requested  
11 changes. I think that's arguing your case.

12 The job of the instructions is simply to give  
13 definitions of law to the jury but not necessarily to explain  
14 how those definitions apply to the case. In my view, that  
15 would overly help the jury making a decision one way or the  
16 other.

17 So I'm not going to make the changes that the  
18 government requested, and as far as I can tell, other than the  
19 classification markings instruction we just got, there were no  
20 other requests to change anything in the charge. Is that  
21 correct?

22 MR. FITZPATRICK: That's right, Your Honor.

23 THE COURT: All right, that's fine, Mr. Fitzpatrick.

24 Now, the defense filed a series of objections. I  
25 don't think those objections require any changes to the

1 instructions to the extent that both the instruction as to the  
2 witnesses and the exhibits that have -- that we had to handle  
3 specially clearly told the jury not to draw any inferences, and  
4 therefore, the language is already there, and I don't think the  
5 additional language is helpful, so I'm not going to add that.

6 In terms of the description of the counts, including  
7 language about the Eastern District of Virginia, I told the  
8 defense the choice you have is either a brief summary of what's  
9 involved in those counts or the indictment goes to the jury,  
10 and you-all are much happier with the indictment not going in.  
11 Those counts do allege Eastern District of Virginia, and I  
12 think it is therefore appropriate that that be in the overall  
13 very brief summary of those counts, so I'm overruling that  
14 objection.

15 And I didn't think there was any merit to any of the  
16 others, but I'll hear any last-minute discussion of the  
17 instructions.

18 The other thing I just want you to know so there's no  
19 surprises, it's my standard practice when I give them the  
20 direct and circumstantial evidence instruction to give them an  
21 example, and it's usually it snowed in your front yard. You  
22 see a footprint. You can draw an inference that there was  
23 someone in your yard. Most of you have heard me do that one  
24 before.

25 And with possession, I am leaving constructive

1 possession in here because you have Mr. -- the allegation that  
2 Mr. Risen got the possession from the defendant. I give the  
3 jury, my standard example is actual possession, I've got  
4 physical control of this pen. Constructive possession,  
5 Ms. Guyton works for me, and therefore, I can tell her what to  
6 do with her laptop computer, and therefore, I am considered in  
7 the eyes of the law to have constructive possession of that  
8 computer.

9 I'm not going to do joint and single. That we don't  
10 need.

11 And those should be the only two slight ad libs.

12 All right, Mr. MacMahon?

13 MR. MAC MAHON: Yes, Your Honor, good morning. Just  
14 briefly, with respect to the -- can I read from here, Your  
15 Honor?

16 THE COURT: Yeah. I know you're uncomfortable, yeah.

17 MR. MAC MAHON: Judge, with respect to the venue  
18 instruction, I understand the Court's ruling, but I did want to  
19 put in the record -- I assume our objections are going to be  
20 put in the record. Do you want us to file them ECF?

21 THE COURT: You should do them ECF so they're  
22 formally on the record, yes.

23 MR. MAC MAHON: We will do that, Your Honor, and I'll  
24 hand Mr. Trump a copy. We have one for you, Your Honor, but --

25 THE COURT: Oh, my law clerk can get it from you.

1 Ms. Copsey?

2 MR. MAC MAHON: Judge, I'm just handing you a page  
3 from your opinion on the grand jury subpoena of Mr. Risen just  
4 to put in the record here --

5 THE COURT: All right.

6 MR. MAC MAHON: -- as well.

7 What you wrote on page 24 of the opinion, which is  
8 November 30, 2010, is -- and this, this is the substance of the  
9 instruction that we asked for and it was refused -- is that  
10 prosecutions involving disclosure of classified information,  
11 venue is proper both where the information is sent and where it  
12 is received.

13 And you talk about venue --

14 THE COURT: But read the next sentence: "Then you  
15 may be in multiple districts as long as part of the criminal  
16 act took place in that district," and I think that's not  
17 inconsistent with my statement that as long as an act in  
18 furtherance of the crime occurred in the district, there's  
19 venue. So I --

20 MR. MAC MAHON: Well, I understand your ruling, Your  
21 Honor, but I don't -- the defendant objects to the instruction.

22 THE COURT: I understand.

23 MR. MAC MAHON: It doesn't say the disclosure, that  
24 venue is proper where it's sent or received. I'm just making  
25 the record, Your Honor. Thank you.

1           THE COURT: That's fine, Mr. MacMahon. Anything  
2 else?

3           MR. TRUMP: Yes.

4           THE COURT: And, Mr. MacMahon, the other objections  
5 you had as to a definition of "causation" and "classified  
6 information," the Court not only gives the elements of the  
7 offense to a jury in jury instructions, but it's also expected  
8 to give legal definitions of key terms within the elements, and  
9 "national defense information" is a key term that does have to  
10 be explained, and some of the -- as does "willfully,"  
11 "knowingly."

12           I mean, some of these are English language words, but  
13 in any standard charge, you still give the jury some specific  
14 help. So to the extent that we've defined certain terms and  
15 you've objected to that, I'm overruling that objection as well.

16           Now, Mr. Trump?

17           MR. TRUMP: Yes, Your Honor. On the possession  
18 issue, and I don't believe there was any dispute from the  
19 defense this morning, the definition, the fifth paragraph in  
20 that instruction --

21           THE COURT: All right, give me the number of the  
22 instruction.

23           MR. TRUMP: Possession defined.

24           THE COURT: Yeah. You've got page numbers. Just I  
25 can get it faster. On the bottom of your -- go ahead. While



1 you're talking, let me look for it. Go ahead.

2 MR. TRUMP: The way it reads is incorrect in terms of  
3 Counts 1, 4, and 6. It should be in the past tense. In other  
4 words, "In this case, lawful possession of classified  
5 information means possession" --

6 (Knocking on Jury Room door.)

7 THE COURT: Wait, wait, wait, wait, wait.

8 MR. TRUMP: Page 31, Your Honor.

9 THE COURT: Thank you. Go ahead.

10 MR. TRUMP: "For Counts 1, 4, and 6, a person has  
11 lawful possession of something if he is entitled to have it.  
12 In this case, lawful possession of classified information means  
13 possession of classified information by a person who held an  
14 appropriate security clearance at the time the person acquired  
15 the information."

16 THE COURT: Does the defense have any objection to  
17 that?

18 MR. MAC MAHON: No, Your Honor, not to that part of  
19 it. I mean, I've looked at it this morning. The part about  
20 the memories and otherwise, I think, is argumentative, but, you  
21 know, the issue in the case is there's no question Mr. Sterling  
22 had a clearance when he obtained this information and that all  
23 the events that took place thereafter, he didn't, he didn't  
24 have a need to know, so I think that is a clarification that  
25 would be good.

1           The rest of it, I don't think it's necessary.

2           THE COURT: All right, so let me go over that again.  
3 "Possession of classified information by a person who held an  
4 appropriate security clearance" --

5           MR. TRUMP: -- "at the time the person acquired the  
6 classified information."

7           THE COURT: Wait a minute. Do we need "and had a  
8 need to know"?

9           MR. TRUMP: "And had a need to know."

10          THE COURT: "At the time he acquired"?

11          MR. TRUMP: "At the time the person acquired the  
12 classified information."

13          THE COURT: We will add that.

14          I did omit to tell the government, you-all, I am  
15 striking the 404(b) instruction. It's not -- the defense  
16 doesn't want it; the government doesn't need it. It's normally  
17 done to protect the defendant, so I agree with you, I don't  
18 think in this case it helps your case very much, all right?

19          MR. MAC MAHON: The instruction, Your Honor.

20          THE COURT: I'm getting rid of the instruction.  
21 That's what you wanted, and I think that's correct.

22          MR. MAC MAHON: Well, the way it was written, Your  
23 Honor, suggested it was evidence of other crimes.

24          THE COURT: Well, I tried to make it other acts. But  
25 you don't want a 404(b) instruction; is that correct? If you

1 look at the book, if you look at O'Malley, it has acts and it  
2 has crimes.

3 MR. MAC MAHON: Well, there's clearly going to be  
4 argument about these letters and that they're not -- they  
5 aren't part of the indictment, so I think the jury --

6 THE COURT: It's not the letters. It's the --

7 MR. MAC MAHON: It's the phone number, whatever --

8 THE COURT: It's the three documents that the  
9 government maintained were still Secret when they were obtained  
10 from your client's home, correct?

11 MR. MAC MAHON: Yes.

12 THE COURT: All right. Do you want an instruction on  
13 that or not?

14 MR. MAC MAHON: Can I consult with Mr. Pollack, Your  
15 Honor, briefly?

16 THE COURT: All right.

17 MR. MAC MAHON: Your Honor, the instruction goes to  
18 other acts. I think the jury is going to wonder, especially in  
19 the manner in which they saw those, what those documents would  
20 be. The objection I filed last night was as to the -- there's  
21 no, there's no 404(b) pattern type of evidence here that that  
22 evidence would be, so it's hard to craft the instruction, I  
23 understand.

24 THE COURT: Well, all right. That's why I omitted  
25 the, the docket numbers. I could do it now. What I was going

1 to say and what it says now, "The government has introduced  
2 evidence that defendant had classified documents," and I'm  
3 going to do the exhibit numbers. I think it's 141 through --

4 MR. MAC MAHON: There's four of them.

5 THE COURT: 141, -42, -43. It's just those three.

6 MR. MAC MAHON: No, there were four, Your Honor.

7 There was also the, the report he had when he was a trainee.

8 MR. OLSHAN: Your Honor, there was four exhibits,  
9 only three of which were introduced by the silent witness rule.

10 THE COURT: All right. Is that 145 then?

11 MR. OLSHAN: Correct.

12 THE COURT: All right. "In his custody when his  
13 residence was searched." And that's correct, and that evidence  
14 did come in.

15 MR. MAC MAHON: Yes.

16 THE COURT: And I changed the instruction slightly.  
17 "Evidence that an act was done by the defendant at some time is  
18 not, of course, evidence or proof whatever that at another time  
19 the defendant performed a similar act, including the offenses  
20 charged in the indictment."

21 MR. MAC MAHON: Yes. We would request that  
22 instruction.

23 THE COURT: Well, that's what I gave you here.

24 MR. MAC MAHON: Well, I thought there was more to it  
25 that --

1 THE COURT: Well, then it says, "Evidence of a  
2 similar act may not be considered by the jury in determining  
3 whether the defendant actually performed the physical acts."

4 MR. MAC MAHON: Mr. Pollack is asking that it be  
5 "another act," because there isn't a similarity here between  
6 the acts and the way the evidence came in, but I think the jury  
7 does need to be instructed that it's just an act and how it  
8 could be considered, because it was proffered just as evidence  
9 of venue, and they don't need to be told -- I'm sure they'll be  
10 told that in the argument, but --

11 THE COURT: All right, I believe I got the  
12 word "other crimes" out, but I think I still left it in the  
13 last paragraph, but, I mean, the way I modified the standard  
14 404(b) instruction was to get out "evidence of other crimes"  
15 and do it "evidence of other acts," all right? And that's  
16 relevant only to the issue of intent.

17 Yeah.

18 MR. OLSHAN: Would the Court mind just reading the  
19 portion of the instruction that the Court has as to what they  
20 may consider it for?

21 THE COURT: Look at 24.

22 MR. OLSHAN: Page 24.

23 MR. MAC MAHON: Page 24, Your Honor?

24 THE COURT: Page 24 is where I've got it.

25 So the key -- I think the key paragraph, "If the jury

1 should find a reasonable doubt from other evidence in the case  
2 that the defendant did the act or acts alleged in the  
3 particular count under consideration, the jury may then  
4 consider evidence as to an alleged earlier act of a like nature  
5 in determining the state of mind or intent with which the  
6 defendant actually did the act or acts charged in the  
7 particular count."

8 Now, that's verbatim from the standard jury  
9 instruction.

10 MR. MAC MAHON: I think that's a model instruction,  
11 isn't it, Your Honor?

12 THE COURT: It is a model instruction. I took out  
13 the word "crime," so it's been modified, frankly, in your favor  
14 in that respect. And then I have to take the word "crimes" out  
15 of the last paragraph.

16 MR. MAC MAHON: They've already been told he's not on  
17 trial for any other crimes.

18 THE COURT: Correct. And I've got it in the previous  
19 instruction, on 23. So, I mean, it's been told twice.

20 MR. POLLACK: I'm sorry, Your Honor, in the first  
21 paragraph, you're going to say that at another time, the  
22 defendant performed another act, or is it going to say a  
23 similar act?

24 THE COURT: It just says, "The government has  
25 introduced evidence that defendant had classified documents,

1 Exhibits 141 through 145" -- right? I'm going to add that.

2 MR. OLSHAN: 142 through 145.

3 THE COURT: 142 through 145.

4 MR. POLLACK: Yes.

5 THE COURT: ". . . in his custody when his residence  
6 was searched. Evidence that an act was done by the defendant  
7 at some other time is not, of course, any evidence or proof  
8 whatever that at another time, the defendant performed a  
9 similar act, including the offenses charged in the indictment."

10 That's absolutely, I mean, that's absolutely -- other  
11 than I took the word "crimes" out as to the 404(b) evidence,  
12 all right?

13 MR. POLLACK: Yeah. And I understand, Your Honor. I  
14 just -- I would in that last line say "performed another act"  
15 rather than "a similar act."

16 THE COURT: I'm not going to do that. I think I'm  
17 sticking with the language. I've changed enough of it.

18 MR. MAC MAHON: Your Honor, can I talk to Mr. Trump  
19 for one second about this instruction?

20 THE COURT: Go ahead.

21 MR. MAC MAHON: Your Honor, with respect to the  
22 possession defined instruction?

23 THE COURT: Yes.

24 MR. MAC MAHON: In the government's revised draft on  
25 the new paragraph 6?

1 THE COURT: Go ahead.

2 MR. MAC MAHON: It says, "unauthorized possession of  
3 classified information means possession of classified  
4 information," and what was handed to me is a, is a statement,  
5 namely, a letter related to Classified Program No. --

6 THE COURT: I don't have that. I did not agree to  
7 put that request in this instruction.

8 MR. MAC MAHON: Okay. That's fine, Your Honor.

9 THE COURT: Okay?

10 MR. MAC MAHON: I didn't know that that had been -- I  
11 think it may help the jury. So it can't be -- but that's fine;  
12 I accept that.

13 THE COURT: Do you want --

14 MR. MAC MAHON: I mean, I would think that rather  
15 than thinking that it was all the classified information that  
16 may have been in his head or other things, that we're limited  
17 to the letter about Classified Program No. 1, which is the  
18 chart.

19 THE COURT: If you -- if both sides want that, I'll  
20 be glad to enter it.

21 MR. TRUMP: For those counts, 2, 5, and 7, it's taken  
22 directly from the indictment, namely, a letter related to  
23 Classified Program No. 1.

24 MR. MAC MAHON: And I think that would eliminate the  
25 potential for confusion of the jury as they try to decide what



1 exact classified information.

2 THE COURT: All right, tell me which line in that you  
3 want it. "In this case, unauthorized possession of classified  
4 information means possession of classified information by a  
5 person."

6 MR. MAC MAHON: After "classified information" is  
7 comma, "namely, a letter related to Classified Program No. 1."

8 THE COURT: All right, I will add that.

9 MR. POLLACK: Your Honor, Mr. Trump said that applies  
10 to Counts 2, 5, and 7. I think it also applies to Count 3.

11 THE COURT: Well, we're not talking about Count 3  
12 here.

13 MR. POLLACK: I understand, but I think the same  
14 should be on the Count 3 instruction. The national defense  
15 information we're talking about in Count 3 is the letter.

16 THE COURT: All right, does the government agree with  
17 that? What we could do is on page 41, where we're giving the  
18 elements of Count 3, and the first element, "that on or about  
19 the date set forth in the indictment" -- I thought we had put  
20 the date in there because I want to help the jury not have to  
21 search for those things -- "the defendant had unauthorized  
22 possession or control over a document relating to the national  
23 defense, specifically, a letter."

24 MR. POLLACK: Yeah, it looks like you already have  
25 it, Your Honor, I'm sorry, on page 39.

1 MR. MAC MAHON: I'm sorry to be double-teaming you,  
2 Your Honor. We're all trying to get this done. But on page  
3 39, the nature of the offense on Count 3, says "namely, a  
4 letter relating to Classified" --

5 THE COURT: So it's there. And the date --

6 MR. MAC MAHON: It's there, but it's not described as  
7 an element of the offense.

8 THE COURT: Well, it's not really an element. It's  
9 not an element. That's the, that's the item that fulfills that  
10 element.

11 MR. MAC MAHON: Thank you, Your Honor.

12 THE COURT: So all right, it's there.

13 All right, is there anything else? Because we want  
14 to get the jury --

15 MR. TRUMP: Yes, yes, Your Honor. The modification  
16 to your 404(b) evidence does not take into account the other  
17 permissible uses of 404(b). We did not offer it for proof of  
18 intent. We offered it for proof of opportunity, intent,  
19 preparation, plan, and knowledge. All of those should be in  
20 the instruction.

21 THE COURT: What book are you looking at? Because  
22 the one I took it --

23 MR. TRUMP: I'm looking at the rule, Your Honor.

24 THE COURT: I'm sorry?

25 MR. TRUMP: I'm looking at the rule, Rule 404(b). I

1 mean, typically, 404(b) in many cases is offered for intent,  
2 but that is not the purpose here.

3 THE COURT: I'm using the standard jury instruction,  
4 which is not a misstatement of the law. And you can argue.  
5 You can argue. I've ruled on that.

6 All right, anything else, Mr. Trump?

7 MR. TRUMP: No, Your Honor.

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(Recess from 2:46 p.m., until 4:22 p.m.)

(Defendant present, Jury out.)

THE COURT: Well, I told you-all this was a smart jury. I just, I love the questions that we get. It shows that they're reading and thinking.

All right, the answer for the first question is easy. "The jury would like further clarification on 'venue' (page 56 of the jury instructions). More directly, Count 10, how is venue determined?"

And there is a Fourth Circuit case that I think is right on point. It's *Rodriguez-Moreno* and *Bowens v. United States*, but they both seem to hold the proposition that venue is proper in the district where the effects of the offense would be felt, concluding that because the effects of the materially false statements were felt by those conducting a federal investigation in Maryland, venue was proper in that district.

So the effect for Count 10 would be felt by the grand jury in the Eastern District of Virginia, and that's why that's a relatively easy answer.

MR. TRUMP: Yes, it's --

THE COURT: Because they're specifically concerned about Count 10.

MR. TRUMP: Yeah, it's in the statute, Judge. A

1 prosecution under this section may be brought in the district  
2 in which the official proceeding was intended to be affected.

3 THE COURT: That's even easier. Hold on a second.

4 (Laughter.)

5 THE COURT: Always start with the statute. You're  
6 correct, Mr. Trump. All right, let me -- what's our code  
7 section for that?

8 MR. TRUMP: 1512(g) -- excuse me, (h)(i).

9 THE COURT: All right, 1512(g)?

10 MR. TRUMP: (H).

11 THE COURT: I'm sorry, (h).

12 MR. TRUMP: 1512(h)(i). Excuse me, it's just -- I'm  
13 misreading that. It's 1512(i).

14 THE COURT: Correct, you're right. So a prosecution  
15 under -- the prosecution under Count 10 may be brought in the  
16 district in which the official proceeding was intended to be  
17 affected, all right? Or in the district. So I'm going to read  
18 it that way, all right? That's from the statute.

19 And I think that's the only answer they are  
20 requesting at this point.

21 MR. MAC MAHON: Well, Your Honor, if I may, I think  
22 that the question about clarification on venue, I know they're  
23 just asking about Count 10 here, and, and I think that the  
24 instruction that we proffered before about where the element of  
25 these other offenses where the information was disclosed or

1 where somebody was when they heard it is the proper venue in  
2 the 793 counts, and I think that's what they're asking as well,  
3 and I think that's what they should be told.

4 THE COURT: Well, I'm not going to go beyond the  
5 specifics of the question, and because they did it  
6 specifically, I'm going to address that. If they have further  
7 questions, they are not going to be shy about coming back, all  
8 right?

9 MR. MAC MAHON: Your Honor, your answer is just,  
10 you're going to be very clear that it pertains only to Count  
11 10?

12 THE COURT: To Count 10, yes. All right?

13 MR. MAC MAHON: It doesn't affect venue for any other  
14 count.

15 THE COURT: Correct. I will say, though, in doing a  
16 quick check of my book on Fourth Circuit criminal law, the  
17 concept on venue does seem to be very statute specific, so I  
18 suggest since this issue may come up again, the government --  
19 both sides may want to do some specific research on these -- on  
20 the other counts for venue issues.

21 Again, what I said years ago in the context of, you  
22 know, deciding on the Risen issue is not necessarily a complete  
23 or full instruction. That was never the intention of the Court  
24 back then. You've been citing me to me. I'm not reversing  
25 myself; I just want to -- there must be other judges who have

1 also addressed the issue of venue for these statutes, maybe  
2 not.

3 MR. MAC MAHON: We'd like the cite Brinkema on venue,  
4 Your Honor.

5 THE COURT: Yeah, Brinkema on venue, right.

6 But anyway, let's get the jury in. They want to go  
7 home at 5:15 tonight. I will bring them in here before I send  
8 them home.

9 MR. OLSHAN: Your Honor?

10 THE COURT: Yeah.

11 MR. OLSHAN: There was a second question that just  
12 came out?

13 THE COURT: Yeah. They want to stick sticky notes on  
14 the wall, all right? We're telling them they can't do that.  
15 They have to use the board.

16 We're giving you every note that we get, and I  
17 don't -- if you didn't get those yet --

18 MR. OLSHAN: I think it literally just came out as  
19 the Court was coming out.

20 THE COURT: Yeah. Do you like our snazzy new forms?  
21 We're giving them some structure. Okay.

22 (Jury present.)

23 THE COURT: Again, folks, you can really sit anywhere  
24 in the box where you're comfortable. That's all right. You  
25 like your seats. Have a seat, please.

1 I was just telling the attorneys I knew you were a  
2 sharp jury, and that was a very smart question you sent. Let  
3 me address the easier question. You can have all the Post-it  
4 notes you want, but you can't put masking tape on my walls,  
5 okay?

6 A JUROR: I thought you might say that.

7 THE COURT: Okay. You can put masking tape on the  
8 tripod; you know, we've given you an easel; and the sticky  
9 notes, the Post-it notes won't hurt the walls. I don't care if  
10 you want to put those on the walls, all right? But, you know,  
11 it's government property. You don't want to be destroying it.  
12 All right.

13 Now, in terms of the substantive question, you've  
14 asked: "The jury would like further clarification on 'venue.'  
15 More directly, Count 10, how is venue determined?"

16 I understand that's your question. And for Count 10,  
17 which is again the obstruction charge, that's actually -- the  
18 venue provision is actually in the statute, and I probably  
19 should have given that to you. So a prosecution under this  
20 section may be brought in the district in which the official  
21 proceeding (whether or not pending or about to be instituted)  
22 was intended to be affected or in the district in which the  
23 conduct constituting the alleged offense occurred.

24 And what I'll do is I'm going to photocopy just that  
25 section to give to the jury so they have it as an additional



1 instruction along with the other ones.

2 Any objection to doing that?

3 MR. MAC MAHON: No objection.

4 MR. TRUMP: (Shaking head.)

5 THE COURT: All right. So this additional  
6 instruction, I'll put another -- I'll put it in the, give you a  
7 page number so it's sort of logical, and it will say for Count  
8 10, so you don't mix it up with anything else, but for Count  
9 10, there's actually a statutory provision, all right? And  
10 I'll get that to you, all right?

11 The other thing is, folks, I know you want to leave  
12 at 5:15 today, and that's fine, but our, our practice will be  
13 before any session is ended for the day, I always want to bring  
14 you back in just to make sure I remind you about, you know, how  
15 you have to behave from here on out, all right?

16 So we'll recess court to await your decision.

17 (Recess from 4:30 p.m., until 5:18 p.m.)

18 (Defendant and Jury present.)

19 THE COURT: Ah, the jury has indicated they want to  
20 start at 8:30 tomorrow morning, bright and early, so I'll  
21 require at least one attorney for each side to be in the  
22 courtroom. That's great, ladies and gentlemen.

23 Now, it's pretty cold in the courtroom right now.  
24 Was the jury room comfortable when you were in there?

25 (Jurors nodding heads.)

1           THE COURT: All right. Don't be -- you won't be shy,  
2 I don't even have to say that, about sending us notes. The  
3 temperature is tough to keep under control, but we'll try to  
4 make it as comfortable for you as possible.

5           All right, so I'm going to send you home for the  
6 evening. Please remember my cautions: You must not try to  
7 communicate with each other or your two former colleagues.  
8 Don't discuss this case with anyone. Again, some of your  
9 family may know what case you're sitting on. If they want to  
10 talk to you about the article in *The Post* or anything else,  
11 you've got to tell them, "Judge said absolutely no." Do not do  
12 it.

13           And don't take any of the evidence home with you.  
14 You can't be studying it overnight. If you're reading the  
15 chapter, Exhibit 132, you need to read it here in the jury  
16 room.

17           So just -- you've been a great jury. Don't let  
18 anything mess up our case at this point. And we'll see you  
19 back here at 8:30. I'm not going to bring you back into court.  
20 You can just report to the jury room, and once all 12 of you  
21 are there, you can start deliberating. Again, until you're all  
22 12 in the room, you can make pleasantries about the weather or  
23 the upcoming weekend, but do not discuss the case, all right?  
24 Thank you. We'll let you-all go.

25           I'll stay in session for a few minutes.

1 MR. MAC MAHON: Thank you, Your Honor.

2 (Jury out.)

3 THE COURT: Mr. MacMahon, you had an issue you wanted  
4 to raise?

5 MR. MAC MAHON: Yes, Your Honor. You invited us to  
6 go do some more research on the venue question.

7 THE COURT: Yeah.

8 MR. MAC MAHON: And --

9 THE COURT: Have you shared your results with the  
10 government, or are they hearing it for --

11 MR. MAC MAHON: It's hot off the press, Your Honor.

12 THE COURT: Right.

13 MR. MAC MAHON: And I'm happy to share it with them  
14 now as well, and I have a copy for you, but the *Truong*, I think  
15 it's the *Truong* case --

16 THE COURT: Oh, that's an old case out of the Vietnam  
17 War, yep.

18 MR. MAC MAHON: Well, this, this -- we have a copy  
19 for the Court as well.

20 THE COURT: All right, if you'd give it to Mr. Wood?  
21 Yeah.

22 They have an exhibit for me.

23 MR. MAC MAHON: Judge, it's footnote 11. The way  
24 this printed out is not -- but this is *U.S. v. Truong*,  
25 T-r-u-o-n-g.

1 THE COURT: I know the case. I was around in those  
2 days, yeah.

3 MR. MAC MAHON: I was just giving it for the court  
4 reporter, Your Honor. I was getting that look from the court  
5 reporter.

6 THE COURT: Oh, I'm sorry. Go ahead.

7 MR. MAC MAHON: And it's 629 F.2d 908.

8 But, Judge, in footnote 11 in the *Truong* case, there  
9 was -- and this was a search for venue questions in espionage,  
10 and this was a 793 conviction and a 794 case, but what the  
11 Fourth Circuit did in affirming in that case was language in a  
12 footnote which is found on page 18, footnote 11 -- and it came  
13 out double-sided; I'm sorry, Your Honor -- but the defendant in  
14 that case complained about venue in an espionage case, and  
15 there's the language about how it's constitutional and why it's  
16 important that venue be established since the defendant has the  
17 right to be charged in the district where the crime occurred,  
18 and it says in 11 that since Krall was the means by which the  
19 documents were carried to the Vietnamese in Paris, the  
20 proscribed act, the act of transmission took place in  
21 Alexandria.

22 So in that case, albeit in a footnote, there is a  
23 Fourth Circuit opinion that says the proscribed act under 793  
24 is the act of transmission, which is what we've been arguing to  
25 the Court. It's not all the other peripheral instances that

1 happened or may have happened in this case or even in the  
2 *Truong* case.

3 And the cite there is to *U.S. v. Walden*, which I  
4 think you cited to us a couple days before, and the *Walden*  
5 case, which we pulled up, also, deals with how it's -- it is  
6 element specific, the acts of venue, because of the  
7 constitutional right to be tried in the, in the district where  
8 the crime is committed. They cite --

9 THE COURT: But, you know, the other issue -- and  
10 again, I'm going to let the government research this overnight.  
11 It's early enough in the jury's deliberations if we have to  
12 refine the venue instruction, it's not going to be a problem,  
13 but there's also a pretty well-established principle that  
14 where, where a -- where the effects of a crime are felt can be  
15 part of the continuity of venue. I mean, again, the government  
16 has alleged that these disclosures, among the places where  
17 there was an unlawful disclosure are here in Virginia.

18 MR. MAC MAHON: All right, Judge. There's a couple  
19 counts that deal with that but not every count, and really, I  
20 don't think that in -- if the government needs time to research  
21 it, it's fine, but what these, what these cases are saying is  
22 that it's the proscribed act in the case. It's not an  
23 ephemeral concept that we decide where, where a crime -- in  
24 very few cases is there an issue of venue. Normally in all of  
25 our plea agreements or cases we have, someone says, "I was in

1 the Eastern District of Virginia." It's never an issue in  
2 almost any case that we've ever had -- that I've ever had in  
3 front of you. I've never had the issue come up.

4 THE COURT: But I've had the issue come up. I  
5 mentioned a couple examples to you yesterday.

6 MR. MAC MAHON: But I don't, I don't believe -- I  
7 think when you read *Walden* and you read this *Truong* case, that  
8 you have to find an act that was element specific. It says in  
9 this *Truong* footnote --

10 THE COURT: Wait. But why is not at least, for  
11 example, causing the disclosure or causing the communication --  
12 part of the problem is the communication occurs, part of the  
13 communication is in the Eastern District of Virginia. That is,  
14 when the book enters Virginia, there has been --

15 MR. MAC MAHON: And that's very few counts, Judge.

16 THE COURT: I'm sorry?

17 MR. MAC MAHON: Not every count deals with the  
18 publication of the book in Virginia.

19 THE COURT: No, I recognize that.

20 MR. MAC MAHON: There's attempts. There's conveyance  
21 of property. There's other counts that it's possible you  
22 could -- I mean, we would again renew the Rule 29 on this  
23 issue, and I don't expect the Court to grant it at this time,  
24 but there isn't any evidence of transmission of this  
25 information. The four phone calls add up to about a minute,

1 and it has to be element-specific.

2 It can't just be the sale of the book. If it's just  
3 the sale of the book, then every count but that has to go out  
4 because there isn't any evidence of venue, and that was the  
5 instruction that we gave you before, which is they have -- the  
6 government has to prove where the act of transmission or  
7 receipt took place here in the Eastern District of Virginia,  
8 and there's no evidence of that whatsoever.

9 THE COURT: All right, what I'm going to do, I mean,  
10 the jury has this case now.

11 Mr. Trump, are you ready to respond?

12 MR. TRUMP: Your Honor, in the *Truong* case, it was a  
13 conspiracy case, and Truong and Humphrey were coconspirators.

14 THE COURT: I know.

15 MR. TRUMP: They were arguing the case that they  
16 should have been charged in D.C. because that's where the  
17 conspiracy was located, but they were prosecuted in Virginia  
18 because they transferred the documents to the unwitting person  
19 who then flew to Paris from Virginia.

20 So it was a question of in that case, that the  
21 defendant was claiming I should have been charged in D.C., and  
22 the court said no, there was an act of transmission occurring  
23 in Virginia. You could have been charged in D.C., but you  
24 weren't. You were charged in Virginia.

25 So it's not, it's not a definitive statement that the

1 only place the case could have been charged was in Virginia.

2 THE COURT: And the even more general proposition of  
3 law was that there was an act in furtherance of the conspiracy  
4 that occurred in the Eastern District of Virginia in that case.

5 MR. TRUMP: Well, there was also conspiracy to  
6 violate 793, but even in the 793 context, it wasn't a  
7 definitive statement that the only place it could have been  
8 charged was, was Eastern District of Virginia, but there's also  
9 a fundamental point that the jury has been instructed and we  
10 argued the case based upon the proffered instruction.

11 I think at this point, if it's error, it's error, and  
12 we'll find out at some point if the defendant is convicted, but  
13 if we are to revise the instruction now, we can't go back and  
14 reargue the case.

15 THE COURT: Well, I don't think it was that major an  
16 argument in the case, but I'll let it be as it is. As I said,  
17 if we get questions, we'll have to address the specific  
18 questions that come up from the jury, and at this point, as I  
19 said, I'm not uncomfortable with the venue instruction, and  
20 that's what it is.

21 So you've made the record, Mr. MacMahon, and I'm not  
22 changing --

23 MR. MAC MAHON: We'll do more research, Your Honor,  
24 if you want us to. We'll go back to the library.

25 THE COURT: I never discourage counsel from reading



1 the law; that's wonderful; but in any case, I do think, though,  
2 out of fairness to the government and to the Court, you need to  
3 send it to us in writing so that we have a chance to look at it  
4 and not just have to, you know, think about it from the bench,  
5 okay?

6 MR. MAC MAHON: We'll draft something.

7 THE COURT: All right. So tomorrow morning, 8:30.  
8 We'll recess court until then.

9 (Recess from 5:28 p.m., until 8:30 a.m., January 23, 2015.)  
10

11 CERTIFICATE OF THE REPORTER

12 I certify that the foregoing is a correct excerpt of the  
13 record of proceedings in the above-entitled matter.  
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/s/  
Anneliese J. Thomson